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September 28, 2011

Karen V. Gregory
Office of the Secretary
Federal Maritime Commission
800 N Capitol Street NW, Room 1046
Washington DC 20573
secretary@fmc.gov

Re: Yakov Kobel and Victor Berkovich
Complainants vs. Hapag-Lloyd America, Inc. et al
FMC Docket No. 10-06
Hearing Date: August 8, 2011

Dear Ms. Gregory:

Please find enclosed for filing an original and four copies of Complainants' Post-Hearing Brief and Closing Statement, along with the Proposed Findings of Fact and Conclusions of Law. I am enclosing a courtesy copy for Judge Wirth.

These documents have been sent by email to the Court today, as well as to Respondents, in addition to being sent by overnight mail.

If you have any questions, please call me.

Very truly yours,

Donald P. Roach

Encl.

cc: Judge Wirth
Wayne Rohde
John Saffner
Aleksandr Barvinenko

CERTIFICATE OF SERVICE

The undersigned declares under penalty of perjury that the following is true and correct:

1. I am over the age of eighteen years and I am not a party to this action.

2. On September 28 2011, I served a complete copy of: a party to this action:

COMPLAINANTS' POST-HEARING BRIEF AND CLOSING STATEMENT; and

COMPLAINANTS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

to the following parties at the following addresses, postage prepaid by first class mail and email:

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DATED: September 28, 2011.

By: _____

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ORIGINAL

BEFORE THE
FEDERAL MARITIME COMMISSION

YAKOV KOBEL and VICTOR BERKOVICH, Complainants, vs. HAPAG-LLOYD A.G., HAPAG-LLOYD AMERICA, INC., LIMCO LOGISTICS, INC., INTERNATIONAL TLC, INC., Respondents.	)	Docket No. 10-06 COMPLAINANTS' POST-TRIAL BRIEF AND CLOSING STATEMENT

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I

INTRODUCTION

Complainants have filed a Complaint for reparations against Respondents pursuant to Section 11(a)(g) of the Shipping Act. The specific alleged violations are set forth in Complainants Amended Complaint, and will be discussed below with respect to facts and arguments supporting these violations as to each Respondent.

Complainants are filing Proposed Findings of Fact and Conclusions of Law with this Post-Trial brief. References to evidence supporting each proposed finding of fact are noted after each proposed finding. These proposed findings of fact serve as Complainants' summary of the material facts of this case.

II

STANDARD OF PROOF

The Complaint has the burden of proof to establish a violation. The applicable standard of proof is substantial evidence in the amount of information that would persuade a reasonable person that the necessary premise is more likely than not to be true. AHL Shipping Code v. Kinder Morgan Liquids Terminal, FMC Docket No. 04-05, June 3, 2005 (WL 15679, June 13 2005), 46 CFR 502.155. The party with the burden of proof or persuasion must prove this case by a preponderance of the evidence. It is important to draw inference from certain facts when direct evidence is not available, and circumstantial evidence alone may be sufficient. However, such finding may not be drawn from mere speculation, Tienshan v. Tianjin Hua Feng Agency Co., LTD at p. 7-8, Docket 08-04 (March 9, 2011).

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III

HLAG AND HLAI VIOLATIONS UNDER THE SHIPPING ACT

A. Violations of Section 10(d)(1) of the Shipping Act.

1. Receiving and handling and delivery of property – Port of Portland.

Complainants allege that Hapag-Lloyd A.G. (hereinafter referred to as "HLAG") and Hapag-Lloyd America, Inc. (hereinafter referred to as "HLAI'), along with Limco Logistics, Inc. (hereinafter referred to as "Limco") and International TLC, Inc. (hereinafter referred to as "Int'l TLC") violated Section 10(d)(1) of the Shipping Act. This provision states:

> "(1) No common carrier, ocean transportation intermediary, or marine terminal operator may fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing or delivery of property." (emphasis added).

Section 10(d)(1) of the Shipping Act prohibits certain practices by common carriers and ocean transportation intermediaries. In DSW Int'l v. Commonwealth, Inc., FMC No. 1898 (F) at p. 15 (March 29, 2009) citing European Trade Specialist, Inc. v. Prudential-Grace, Lines 19 F.M.C 148, 151 (FMC 1976) stated:

> "[The] Commission does not exercise the authority of a court of law or of equity. We administer and enforce the requirements of the Shipping Act and related Acts. When pleadings come before us in which violations of the Act are heavily veiled in common law pleading it becomes difficult to distill the activities alleged to be in violation of the Act from those which indicate the possible violations of some common law obligation. [We review] the entire record in an attempt to identify with some certainty the particular violations of the Act complained of. Thus, we [do not ignore] the underlying theories of common law wrong, but, rather, [attempt] to pare them down to activities at least colorably justiciable under the mandates of...the Shipping Act...."

The Amended Complaint alleges that HLAG and HLAI violated Section 10(d)(1) of the Shipping Act by HLAG and HLAI by shipping a damaged container, MOGU 2002520, without Plaintiff's authorization and failing to return it as requested to Complainants' yard for inspection or

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repair and reloading before shipment. (Paragraphs 13-19 and Paragraph 43 of Amended Complaint). The evidence received at the hearing proves by a preponderance of the evidence that HLAG and HLAI failed to observe just and reasonable practices related to the receiving, handling, and delivery of property, specifically container MOGU 2002520 by shipping a damaged container without Complainants' authorization.

Container MOGU 2002520 was delivered to Terminal 6 of the Port of Portland by WCT Transport on May 7, 2008 (Ex 36, KOB 0048, and Ex 42, KOB 0057). The container was damaged in the loading process in the hold of Hapag-Lloyd's vessel, the Lisbon Express. On May 8, 2008, an incident report states:

> "While placing the container below deck, the container became wedged in the cell guides and was damaged. The container was already in the cell guides and going down when unforeseen causes wedged the container half way down. The container was brought to the dock and found to have damage to the top rails and sides of the front of the container. The container was not able to load due to the condition of the container." (Ex 47)

On May 9, 2008 an email from an HLAI maintenance repair manager to HLAI employee Catherine Ward stated the cargo needed to be transloaded into a good order unit, as current unit was damaged to the point that it would not load the vessel. (Ex 90, KOB 0287). The email also asked Ms. Ward to notify the customer and ask how they (the customer) wished to handle it (Ex 90, KOB 0287).

On May 13, 2008, Nadya Li of Limco responded that the customer wanted to reload the container himself into a good-order container at his yard and stated that container MOGU 2002520 needed to be repaired or paid for (Ex 90, KOB 0285). On May 16, 2008 Limco responded again stating that the customer did not want to ship the container and demanded it be returned to his yard (Ex 90, KOB 0284) (Kobel, TR 80). Limco, at HLAI's request, obtained estimates from Kobel for

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the repair, reloading and return to his yard and replacement of the container. Yakov Kobel faxed these estimates to Nadya Li at Limco (Kobel, TR 78-80) (Ex 67).

Container MOGU 2002520 was taken off of the vessel (Lisbon Express) and isolated and set aside from the rest of the containers on the pier while awaiting disposition. (TR 540). HLAI began to communicate with the forwarder (Limco) regarding the damage. (Furrer, TR 540).

On May 28, 2008, Max Furrer of HLAI sent an email to Jim Mullen of Ports America (stevedore) regarding a proposed settlement of Complainants' claim for the approximate sum of $6,469 plus trucking in and out of Terminal 6 to Complainants' yard. (Ex 90, KOB 0283). Mullen approved of this proposal (Furrer, TR 558).

Despite assurances from HLAG and HLAI that the container would be returned, HLAG nevertheless shipped the damaged containers on the next HLAG vessel, the Helsinki Express, which departed on or about May 26, 2008. HLAG issued a Seaway Bill on May 25, 2008. (Ex 29, KOB 0033). According to an email from Max Furrer on June 1, 2008, HLAI rolled the container initially, but did not roll it a second time and the container loaded to the next vessel. (Ex 91, KOB 0288, TR 556).

Complainants never authorized HLAG, HLAI or Limco to shipped the damaged container MOGU 2002520 (TR 80-81). Likewise, neither Limco nor Int'l TLC authorized HLAG/HLAI to ship this damaged container (TR 377, TR 560, 593). Furthermore, HLAG and HLAI knew that this customer wanted this container to be returned to its yard. (TR 553-554).

Max Furrer admits it is not HLAG's practice to ship a damaged container, or to ship a container if a customer instructs it not to ship it. In particular, Max Furrer testified as follows:

> "Q And is that a practice that Limco – or Hapag-Lloyd, that they don't – if a container is possibly not seaworthy or some concern, that they would not ship a damaged container?"
>
> **A It's not our practice to ship a damaged container.**

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Q Is that pretty standard in the industry?
A I'm speaking for Hapag-Lloyd.
Q Well, I mean, if you have a container and you have a report that you have like in Exhibit 47, the incident report, and it says that – in this description of the container was not – stevedore writes: The container was not able to load due to the contdition of the container, found to have damaged on the top rails.

Would this be, generally speaking, a container that would not be then loaded and shipped without being either repaired or replaced?
A That's correct.
Q Okay. And is it your practice at Hapag-Lloyd not to ship a container if the customer says don't ship it?
A Yes.
Q And would you say generally in either – so if – in a situation like this where you've got a damaged container and the customer says don't ship it, we want to look at it and repair it, that it would not be shipped on the – on a ship then?
A That's correct."

(Furrer, TR 561-562)

HLAG had control of this container after it was damaged in the loading process and placed in an isolated area on the dock. (Furrer, TR 553). HLAG and HLAI have a load planner who makes a plan for the location of each container on the ship and lists every container stowed on the vessel. (Furrer, TR 553-554). The load plan is submitted to the first mate on the ship. The vessel manifest, which lists all the containers loaded, was then given to the cargo chief and ultimately to HLAG. (Furrer, TR 544-555). When the vessel (the Helsinki Express) sailed, HLAG and HLAI had a manifest showing that the damaged container was on the ship. (Furrer, TR 555).

In short, HLAG/HLAI failed to observe its own practice and accepted industry practice of shipping the damaged container contrary to the specific instructions and authorization of the shipper and also NVOCC, Limco.

HLAI and HLAG apparently argue that the shipment of the damaged container was an accident. However, HLAG and HLAI has possession and control of the damaged container, and knew that the container was on the Helsinki Express. Furthermore, HLAI issued a Seaway bill for

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this damaged container on the Helsinki Express on May 26, 2008. The Seaway bill did not have any notations concerning any damage to the container. (Ex 29).

HLAG/HLAI apparently contends that the damage to the container and the loading of the damaged container on the Helsinki Express was the stevedore's fault. However, the stevedore is the agent of the carrier for purposes of loading the vessel. A carrier is responsible for the actions of its agents. DSW Int'l v. Commonwealth NO 1898(F) at p. 21 (March 29, 2009), Helenic Lines Ltd, v. F.M.C. 673, 676 (FMC, 1964).

Although the stevedore, Port of America, may have caused the initial damage to container MOGU 2002520, it was HLAI employees who instructed the stevedore to load it onto the ship, issued the Seaway bill and prepared the load plan and the manifest at the time of sailing.

2. Handling of the damaged container – Hamburg, Germany and Gydnia, Poland

HLAI and HLAG also violated the Shipping Act in their handling and delivery of the damaged container after the container departed from the Port of Portland on May 26, 2008. This container did not ultimately arrive and become available at the destination in Gdynia, Poland until on or about December 23, 2008, nearly seven months from the time of departure.

Container MOGU 2002520 arrived in Hamburg on or about June 21, 2008. (Ex 74). An email from HLAG in August of 2008 stated that the container was heavily damaged and not really trustworthy. (Ex 93, KOB 0293). The feeder vessel declined to load this damaged container. (Ex 93, KOB 0290). Furthermore, the agent at the destination port in Gydnia (Baltic Sea Logistics) refused to accept the container in its damaged condition. (Ex 93, KOB 0293, Ward, TR 581, 595-596).

On August 22, 2008, Catherine Ward of HLAI sent an email in HLAG in Hamburg, Germany instructing them to transload the cargo from the damage container to an HLAI container

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to survey the container and cargo (Ex. 93, Ex. 94, KOB 0294). However, the container and cargo were never surveyed until November 11-12, 2008. (Ex 46, KOB 0067-0068). The survey confirmed that the container was damaged to the extent that a carriage was not possible and the cargo needed to be reloaded to a replacement container (Ex 46, KOB 0067).

HLAG's emails in August and September 2008 show that HLAG wanted to terminate this shipment in Hamburg. On September 3, 2008, an HLAG email stated that it wanted to terminate the shipment in Hamburg because the container could not be shipped on a feeder vessel, and could not be sent by truck because of missing documents. At that time, HLAG refused to transload the cargo into a HLAG container (Ex 95, KOB 0299). On September 9, 2008, an email from Cynthia Records of HLAI stated that it was unable to load the container in Gydnia and the only viable alternative was to terminate in Hamburg. (Ex 95, KOB 0297). On September 11, 2008, Limco responded that its consignee (Baltic Sea Logistics) could not pick up the container in Hamburg. Limco stated if the container could not be transloaded into another container, and the container should be returned to the USA, and HLAG should pay the shipping expenses and costs. (Ex 95, KOB 0295).

On September 23, 2008, HLAG then threatened abandonment the proceedings and dispose of the cargo unless Limco arranged for customs clearance documents within three days (September 29, 2008). (Ex 96, KOB 0300). Commercial documents were needed to transport the container by truck from Hamburg, Germany to Gydnia, Poland because the container could not be transloaded to a feeder vessel as originally planned as had Complainants' other two containers (MOGU 2112451 and MOGU 2003255). Moreover, the need for commercial papers for customs clearance for trucking across the border would not ordinarily be a problem if it was shipped as planned by a feeder vessel (Ward. TR 583, 597).

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Limco informed HLAG that the agent (Baltic Sea Logistics) received the documents he was waiting for on September 8, 2008. (Ex 95, KOB 0298). Limco supplied HLAG with a packing list for MOGU 2002520 on September 29, 2008 and supplied a commercial invoice by October 7, 2008. (Ex 97, KOB 0301, 0304). Despite knowledge that they would need to transload the cargo or replace the container, HLAG took no action to survey and transload the cargo until after November 12, 2008, when it apparently transloaded the cargo to another HLAG container, No. GLDU7072608. (Ex 100, KOB 0314).

HLAG apparently shipped the cargo in the replacement container by feeder vessel in late November, 2008. The damaged container was then apparently trucked to Gydnia, arriving on or about December 9, 2008. (Ex 74) (TR 607-608). HLAG then transloaded the cargo back into to the damaged container, MOGU 2002520, in Gydnia, Poland on or about December 23, 2008. (Ex 74, KOB 0178, Ossowska, TR 638-639, 652-653).

HLAG apparently contends that the delay of delivery to Poland due to the consignee of the Seaway Bill, (Baltic Sea Logistics), not having the appropriate trade documents for the damaged container. Ossowska testified that proper shipping of the container from Hamburg to Gydnia was missing commercial trade documents. (Ossowska TR, Volume IV, Page 633-635, 639). Ossowska also testified that these documents were necessary to leave Gydnia, but not to receive the container. (Ossowska, TR 633-634).

Ward testified that there were different rules and regulations for trucking across the border to a different border (Ward, TR 583).

Limco had informed HLAG that Baltic Sea Logistics did not want to receive this container in its damaged container. (EX 93, KOB 0293). Catherine Ward's testimony confirmed that Baltic

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Sea Logistics did not want to receive the container because of its damaged condition. (Ward, TR 581, 595-596).

In short, the damaged container was delayed six months from the time it arrived in Hamburg, Germany until it was ultimately delivered in Gydnia, Poland. This shipment from Hamburg to Gydnia, Poland usually takes two days by feeder vessel or 10-12 hours by truck (Ossowska, TR 646). The primary reason for the delay was because HLAG repeatedly sought termination of the shipment in Hamburg, the consignee, Baltic Sea Logistics, did not want to accept the damaged container, and also because of customs clearance requirements to truck rather than ship the damaged container by vessel.

Furthermore, after shipping the container in its own replacement container, HLAG then transloaded the cargo back into the damaged container, which was not trustworthy, and which HLAG could not ship by vessel nor transport together with the cargo by truck.

All of the above factors show a pattern of failure to observe or enforce reasonable practices with respect to receiving, handling, and delivery of property in violation of Section 10(d)(1).

3. Misdelivery of Three Liquidated Containers

HLAG was aware that Kobel and Berkovich were owners of the damaged container as of May, 2008, when Kobel faxed its damage estimate to Limco (Ex 67, KOB 0161-0169), who then forwarded it to HLAI. An email from Limco dated May 13th disclosed its customer (Kobel) as the shipper with his name and address. (Ex 90, KOB 285). Furrer testified that he apparently received this estimate as he objected to the estimated replacement cost of the container. (Ex 67, KOB 168, Furrer TR 544-545). On November 15, 2008, Kobel sent a letter which identified him as the owner of the damaged container. (Ex 69).

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Finally, at the time that this container was released by HLAG to Remishevskiy there was a pending claim for damaged, as of October 31, 2005, by Nadya Li of Limco with HLAI claims. (Ex 98, KOB 0305-0311).

HLAG failed to exercise reasonable care or inquiry regarding container MOGU 2002520 before it was released to Remishevskiy. Misdelivery of a container can be a violation of Section 10(d)(1). DSW International v. Commonwealth supra p. 21.

B. Violation of Section 10(b)(4)(E) and 10(b)(10) of the Shipping Act – Unreasonable dealing or negotiation of claim.

HLAG/HLAI violated Section 10(b)(10)(4)(E) and 10(b)(10) of the Shipping Act by unreasonably refusing to deal or negotiate and acting unfairly in the settlement of the claim. Complainants' Amended Complaint alleges that HLAG unreasonably refused to deal or negotiate with respect to container MOGU 2002520. (Amended Complaint, Paragraph 48).

The Shipping Act provides, under Section 10(b)(4)(e) in pertinent part as follows:

> " * * *
>
> (b) Common carrier. No common carrier, either alone or in conjunction with any other person, directly or indirectly, may
>
> * * *
>
> (4) For service pursuant to a tariff, engage in an unfair or unjustly discriminatory practice in the matter of:
>
> * * *
>
> (E) The adjustment and settlement of claims.
>
> * * *
>
> (10) Unreasonably refuse to deal or negotiate.
>
> * * * " (emphasis added).

Complainants' container was damaged at the Port of Portland on May 8, 2008. Complainants, though Limco, requested an inspection of the container. Limco notified HLAG/HLAI that Complainants wanted their container returned to their yard. Complainants

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submitted estimates for the damages and costs, and expenses to return the container to the yard and load and reload and replace the damaged container. (Kobel, TR 78-80) (Ex 67).

Although HLAG, HLAI and Limco negotiated regarding the amount of compensation, HLAG and HLAI wrongfully and without authorization shipped the damaged container on May 26, 2008, thereby depriving Complainants of an opportunity to inspect the container and either reload or replace/repair the damaged container.

After the containers reached Hamburg, Germany, HLAG unreasonably demanded to terminate this shipment in Hamburg, even though Complainants had already paid the freight for delivery in Gydnia, Poland. (Ex 95, KOB 295) (Ex 110, KOB 329). HLAG persisted in demanding to terminate this shipment from the time it arrived in late June through mid-September, 2008. Limco's emails dated August 4, 2008, and again on September 11, 2008, stated the consignee would not accept the container in Hamburg, and if it could not be shipped to Gydnia, Limco demanded that the cargo be transloaded into another container or shipped back to the United States. (Ex 92, KOB 0289, Ex 95, KOB 0295). Nevertheless, HLAG sent an email on September 23, 2008, giving Limco until September 26, 2009 to produce customs clearance documents, otherwise it would start abandonment proceedings against the damaged container. (Ex 96, KOB 0300).

Because HLAG had still not delivered the damaged container to Gydnia, Poland, on October 31, 2008, Limco filed a claim with HLAG regarding the damaged container, including expenses previously submitted to Complainants on May 20, 2008. (Ex 98, KOB 0305-0311, Ex 99, KOB 0312). HLAG never responded to this claim. (Kobel, TR 88).

Instead, HLAG threatened to bring an abandonment proceeding on Complainants' other four containers held in the Port of Gydnia, Poland in a letter dated November 10, 2008. (HLAG

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Ex 094, Ex 73, KOB 0177) despite the pending claim with respect to Complainants' damaged container.

On November 15, 2008, Kobel sent a letter addressed to HLAG to Limco regarding his claim for the damaged container. HLAG never responded to Kobel's letter. (Ex 69, KOB 0171-0172). (Kobel, TR 86).

In addition, even though HLAG was responsible for wrongful shipment of this damaged container, HLAG considered charging the Port of Portland for storage charges while the damaged container was delayed in Hamburg, Germany in the sum of approximately 15,000 Euros. (Ex 99, KOB 0313).

HLAG was unreasonable in dealing with the claim resulting in an unreasonable delay in the delivery of Complainants' container. Further, HLAG never responded to Complainants' claim for damaged submitted on October 31, 2008 by Limco or by Kobel on November 15, 2008, even after the container arrived in Gydnia. Thus, HLAG has never paid any sum of money for the damaged container, expenses, and delay resulting from the wrongful shipment of this container.

C. Causation.

Complainants have the burden of proving entitlement to reparations. Tienshan v. Tianjin Hua Feng Transport Agency Co., Ltd at p. 21, Docket 08-04 (March 9, 2011). Reparations under the Shipping Act and damages are synonymous damages. Reparations must be a proximate result of violations of the statute. Tienshan v. Tiangan Hua Feng Supra p. 21 and James J. Flannagan v. Lake Charles Harbor and Terminal District, 30S R. R., 8, 13, (2003). The commission generally follows the law of damaged followed by the Courts. Tractors and Farm

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Equipment LTC v. Cosmos Shipping Co. Inc. 26 S.R.R. 788-798-799 (ALJ 1992) Tienshan Inc. v. Tianjin Hua Feng supra at p. 21.

HLAG violated Section 10(d)(1) by wrongfully making an unauthorized shipment of the damaged container from Portland to Gydnia, Poland. HLAG's violation was clearly the cause in fact for Complainants' damages with respect to MOGU 2002520. "But for" HLAG's shipment of this damaged container, Plaintiff would not have suffered the actual damages it ultimately sustained.

Furthermore, shipping the damaged container caused foreseeable risks which were realized when the container arrived in Hamburg, Germany and could not be transported in that condition, thereby causing unreasonable delay. Neither HLAG nor Baltic Sea Logistics, consignee on the Seaway Bill, wanted to deal with the damaged container.

Moreover, if HLAG had handled this container in a reasonable and timely manner, this container would have arrived in Gydnia, Poland long before the time it was sold by Int'l TLC in by February, 2009. Complainants received two other containers, MOGU 2112451 and MOGU 2003255 around November 17, 2008, when Kobel paid storage and trucking fees for their release. (Kobel, TR 100-101; Ex 125, 126, 127). These containers were shipped to the Ukraine from Gydnia in December of 2008. "But for" the violations by HLAI/HLAG, this damaged container would have been picked up in November, 2008 and in all likelihood much earlier, and then transported to the Ukraine. The container would never have been the subject of a wrongful liquidation sale in February, 2009.

The damage to MOGU 2002520 for HLAI's violation for unauthorized shipment is tantamount to conversion at common law. The damages for conversion is the fair market value of converted property or, in this case container and cargo, determined at the time of taking.

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Hence any subsequent acts by a third party do not relieve the converter from liability to the property owner.

Moreover, HLAG is liable for consequential damaged flowing from the unauthorized shipment of the damaged container. Complainants intended to ship all five containers together by railroad from Gydnia, Poland to the Ukraine. (Kobel, TR 89, 91-93; Berkovich, TR 470, 471). Kobel delayed shipment of the other containers, waiting for the damaged container to arrive in Gydnia, Poland, and lost his rail appointments. (Kobel, TR 93-94). As a result, Complainants incurred storage charges for these two containers (MUGO 2112451 and MOGU 2003255) from approximately July 2nd to November 17th, 2008, in the sum of $4,875. (Ex 127).

Moreover, even if the Court found that the wrongful actions of Limco and Int'l TLC regarding the liquidation of MOGU 2002520 was a substantial factor causing Complainants' damage, at most the Court should find that these were concurrent causes with HLAG/HLAI and render parties jointly and severally liable for actual damages to MOGU 2002520 caused by the parties.

IV

LIMCO LOGISTICS, INC.

A. Limco violated Shipping Act Section 10(d)(1) of the Shipping Act by failing to observe just and reasonable regulation practices with receiving, handling and storing property.

1) Changing the Shipper and Consignee for the Three Liquidated Containers to Oleg Remishevskiy Without Complainants' Authorization

Complainants allege that Limco violated Section 10(d)(1) by changing the bills of lading of containers MOGU 2002520, MOGU 2051660, and MOGU 2101987 without Complainants'

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permission or consent, thereby aiding and facilitating the unlawful liquidation of these three containers (Paragraph 43, subparagraphs (f), (g), and (i) of the Amended Complaint).

On March 2, 2009, Int'l TLC requested that Limco change the name of the shipper and consignee to Oleg Remishevskiy for the above three containers. (Ex 85, KOB 0277, TR 684, 685).

Limco then changed these three bills of lading to show Oleg Remishevkiy as the shipper and consignee. (Ex 3, KOB 0003, Ex 13, KOB 0016, Ex 20, KOB 0023). The packing lists were also changed to Remishevskiy's name as shipper. (Ex 6, KOB 007, Ex 23, KOB 0026, TR Page 685).

On March 2, 2008, Limco notified the agent in Gydnia, Poland, Baltic Sea Logistics, of the change of shipper/consignee, attached the altered bills of lading showing the release of cargo to the shipper/consignee Oleg Remishevskiy. (Ex. 86, KOB 0278). Limco then apparently sent the original bill of lading to HLAG, which sent a release for container MOGU 2051660. (Ex 87, KOB 0279).

Complainants never authorized Limco to change the bills of lading for these three containers (MOGU 2002520, MOGU 2051600, and MOGU 2102987) to Oleg Remishevskiy. (Kobel, TR 116; Berkovich, TR 483). Similarly, Complainants never authorized Int'l TLC to change these bills of lading to Remishevskiy. Neither Limco nor Int'l TLC had a power of attorney with respect to these containers or their bills of lading (Lyamport, TR 715, Barvinenko, TR 371-372). Both Lyamport and Barvinenko admit that Complainants never gave them authorization and/or a power of attorney to change the bills of lading of these three containers to Oleg Remishevskiy. (TR 715, 372).

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Moreover, despite repeated personal contact between Kobel and Nadya Li of Limco regarding the damaged container, Limco never inquired of Complainants regarding the instructions from Int'l TLC to change the shipper and consignee to Remishevskiy. Limco knew that Berkovich and Kobel were the owners of the containers and were the principal parties in interest based upon the customs declarations, Limco's billing invoice and its own admission. (Ex 25, 26, 27, 4, 14; Lyamport Ex. 78, KOB 250-251, p. 84, p. 86).

Limco and Int'l TLC consulted with each other almost daily regarding Int'l TLC's sale of these containers. Limco acknowledged receiving a copy of Int'l TLC's notice of unpaid balance to Complainants on January 9, 2009, and knew they would be sold. (Barvinenko, TR 389-390). (Ex 79).

Lyamport testified that Lyamport and Barvinenko had "big discussions" about these containers almost every day. Int'l TLC had made a move to try to find a way to resolve the situation and provide Limco with instructions to change the shipper and consignee to move the cargo out of the port. (Lyamport, TR 743-744).

The Federal Bill of Lading Act, also known as the Pomerene Act (49 USC Section 80102), applies to bills of lading issued by common carriers for interstate transportation of goods exported from the United States to a foreign country.

A bill of lading is negotiable if it states that the goods are to be delivered to the order of the consignee and does not contain on its face an agreement that the bill is not negotiable. (49 USC Section 80103). All the bills of lading issued by Limco to Complainants in the instant case were negotiable bills of lading (Ex 1, 12, 19).

Indorsement is required to negotiate a bill of lading. None of the three bills of lading for the three liquidated containers were ever indorsed by Complainants. The only written instruction

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was given by Complainant Kobel to Int'l TLC to change the consignee from Berkovich to Vassel Bendy for containers MOGU 2051600 and MOGU 2101987. (Ex 68, KOB 169-170 and 68A, KOB 0169A-0170).

The Federal Bill of Lading Act prohibits knowingly 1) falsely making or altering, 2) falsely uttering or issuing a falsely made or altering a bill of lading. (49 USC 80116(2)(A)(B)).

In this case, Limco knowingly changed or issued the bills of lading from Victor Berkovich as shipper to Oleg Remishevskiy and changed the consignee from Victor Berkovich (MOGU 2002520) and Bendy Vassel (MOGU 2051660 and MOGU 2101987) to Oleg Remishevskiy. (Ex 3, 13, 20, TR 684-685). Limco did not have any indorsement or authorization from Complainants to change or issue these bills of lading to Remishevskiy. (Ex 86, 3, 13, 20; Lyamport, TR 685).

2. Wrongful hold on Complainants containers

Lyamport testified that Limco initially placed a hold on all five containers for non-payment of freight. (TR 752). Lyamport admitted that two containers were released, leaving a hold on the remaining three containers (MOGU 2002520, MOGU 2051660, and MOGU 2101987). (TR 752-753).

The carrier cannot impose a lien beyond the amount stipulate in the bill of lading. 49 USC Section 80109. An NVOCC that holds cargo for more than what is owed or for other shipments violates Section 10(d)(1) of the Shipping Act. Tieshan v. Tianjin Hua Feng, supra p. 20. In that case, the Commission found that an NVOCC held cargo by refusing to give an original bill of lading violated Section 10(d)(1) for holding the cargo for more than the amount owed on the bill of lading, and for other, prior shipments.

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Contrary to Lyamport's testimony, freight for damaged container MOGU 2002520 was paid by Complainants to Int'l TLC on July 25, 2008. (Ex 109, KOB 0325). Int'l TLC then paid Limco on July 30, 2008. (Ex 18).

Nadya Li notified HLAG that the freight for the damaged container was paid when she demanded shipment be continued from Hamburg to Gydnia, Poland in September of 2008. (Ex 95, KOB 0295). Barvinenko conceded that all freight for damaged container MOGU 2002520 was paid when sold at liquidation (TR 385).

Moreover, Limco was not entitled to charge freight for a shipment that was not authorized by the shipper. Am Jur 2nd, common carrier, Section 496 p. 893 (2nd ed 2009).

In addition, Limco was paid the freight for container MOGU 2101987 on or about December 21, 2008. (Ex 109, KOB 0339).

Lyamport testified that all ocean freight had been paid as of January or February 2009 and that there was never an agreement for Limco to receive any of the proceeds from the sale. (Lyamport TR, 693). However, records show that a freight payment was received for MOGU 2051660 on March 4, 2008, after the sale. (Ex 58). Further, the only release from HLAG was for container MOGU 2051660 on or about March 20, 2009 (Ex 87).

Furthermore, Limco was not responsible for the storage charges of the liquidated containers. Mr. Ossowska testified that the receiver, Baltic Sea Logistics, was responsible for the storage charges owed to the Gydnia terminal. (Ossowska, TR 654-655). Lyamport admitted storage charges were charged to Baltic Sea Logistics and ultimately they all charged to Int'l TLC. Also, Int'l TLC and not Limco hired Baltic Sea Logistics. (Lyamport, TR 696). In addition, storage charges for the other two containers received were paid by Complainants to Baltic Sea Logistics on November 17, 2008. (Ex 127). Arguably Limco may have had a valid

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hold, if at all, only for unpaid freight for MOGU 2051660 at the time of liquidation sale by Int'l TLC. Any other hold against the other containers was a violation of Section 10(d)(1).

In the instant case, Limco wrongfully placed a hold for damaged container MOGU 2002520 and container MOGU 2101987 when it was already paid freight for both of these containers.

3. Unlawful Delivery of Containers to Oleg Remishevskiy

Misdelivery or failure to deliver a container to the owner or party entitled to possession is a violation of Section 10(d)(1) of the Shipping Act. DSW International, Inc. v. Commonwealth supra p. 21. The Federal Bill of Lading Act imposes a strict liability for damages when a common carrier fails to deliver to a person entitled to possession. 49 USC Section 80111(a).

Based upon Int'l TLC's instruction, Limco wrongfully changed the bills of lading for the three liquidated containers and released them to Oleg Remishevskiy. (Ex 85, 86). Limco's email to Baltic Sea Logistics attached the new bills of lading, which enabled Remishevskiy to obtain possession of these containers in Gydnia, Poland. As discussed in IV(a)(1) above, changing bills of lading was unauthorized and unlawful. Complainants had the right to possession of these goods.

A carrier may have an exception to liability for failure to deliver goods if the consignee or owner, if the goods have been lawfully sold to satisfy a carrier's lien. 49 USC Section 80111(b)(2). This exception is not applicable in this case for several reasons.

First, Int'l TLC did not have any contractual right to sell containers and in fact, did not have any written agreement whatsoever with Complainants. (Barvinenko, TR 348). Furthermore, Int'l TLC did not have any statutory lien, as it was not the carrier but only acting as the freight forwarder.

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Int'l TLC was never licensed as a freight forwarder, and was not licensed as an NVOCC at the time of shipment. Int'l TLC sold these three containers purportedly to collect its fees as well as those of other parties, such as Baltic Sea Logistics and Affordable Storage. (Ex 79, KOB 0271; Ex 80, KOB 0272; Barvinenko TR 380).

Furthermore, Lyamport testified that Limco did not plan the sale or direct Int'l TLC to sell these three containers. (Lyamport, TR 693-694; Ex 78, KOB258, p. 117). Barvinenko likewise testified that Limco did not authorize Int'l TLC to sell these containers. (TR 389). Nevertheless, Int'l TLC notified Limco of the sale, and Int'l TLC and Limco had discussions on a nearly daily basis of the sale. (Barvinenko, TR -389).

Finally, Int'l TLC did not sell these containers to Remishevskiy in a commercially reasonable manner, as discussed Section V(B)(2) below.

4. Limco Violated Section 10(d)(1) by issuing false bills of lading and providing misleading information about the status of the damaged container MOGU 2002520.

Repeatedly providing false or misleading information to a shipper concerning the departure and arrival of container as well as failing to provide original bills of lading or inaccurate documents has been found to be a violation of Section 10(d)(1) of the Shipping Act. Eastern Mediterranean Shipping Corp F.M.C. Docket 98-16 (February 3, 1999).

Limco issued multiple bills of lading for the same containers. Limco changed the bill of lading issued for damaged container MOGU 2002520 (b/l LIM 16090) at least three times. Exhibit 1 (KOB 001) lists Victor Berkovich as the shipper and consignee. Exhibit 2 lists Int'l TLC as the shipper, and Bendy Vassel as consignee, and Exhibit 3 shows Oleg Remishevskiy as shipper and consignee. Likewise, containers MOGU 2051660 and MOGU 2101987 have three same versions for the same bill of lading. (Ex 11, 12, 13, 19, 20).

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Lyamport claims that Limco initially issued a "draft" bill of lading naming Int'l TLC as the shipper/exporter. (Ex 11, 19; Lyamport TR 684). Lyamport testified that this bill of lading was issued by "default" by its computer system. The exporter on these bills of lading were then changed to the actually shipper, in this case Victor Berkovich, when Limco claimed it learned the name of the actual shipper (TR 683-684). (Ex 1, Ex 12, Ex 19).

However, Lyamport's explanation is inconsistent with the documentary evidence and testimony from other witnesses. First, there is no evidence or indication of a "draft" of any of the bills of lading issued to Int'l TLC. (Ex 2, Ex 11, Ex 18). Compare HLAG drafts seaway bills to Limco Exhibits 54 and 55. In fact, Lyamport testified that the information to list Int'l TLC as shipper (Ex 2, Ex 11, Ex 18) came from Int'l TLC, and not by a computer "default." (TR 683).

Second, Limco had knowledge that Berkovich was the exporter for each of the three liquidated container before issuing any bills of lading. Limco invoices to Int'l TLC, Exhibit 4, Exhibit 14, and Limco Exhibit 39, each show Complainant Victor Berkovich as the shipper and were entered before the initial draft bill of lading. The invoice for MOGU 2002520 was entered on April 28, 2008. Moreover, the electronic export information filed by Limco shows Victor Berkovich as the principal party in interest on each. These electronic exports should have been entered at or near the time of sailing (TR 688-689, Ex 25, Ex 26, Ex 27).

Furthermore, Barvinenko's testimony contradicts Lyamport's testimony. Barvinenko testified that the all bills of lading were initially issued to Victor Berkovich but were supposedly changed at the request of Complainant Yakov Kobel, rather than by any "default" in the system (TR 367). Barvinenko admits that he never had any documents authorizing him to change the bill of lading from Berkovich to Int'l TLC and Berkovich and Kobel deny ever authorizing Int'l

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TLC or Limco to list Int'l TLC as shipper. (Berkovich, TR 483; Kobel, TR 123-124; Barvinenko, TR 367, 368).

Lyamport testified at his deposition and also at trial that a bill of lading will not be issued in the name of the actual shipper until after the freight was paid in full (TR 726). Lyamport testified that Complainants never received any documents for any shipment until they paid the freight in full (Lyamport 718). Barvinenko's testimony also confirmed that Plaintiff would not receive a bill of lading until after the freight was paid in full for containers MOGU 2101987 and MOGU 2051660 (TR 375-376).

Ironically, Exhibits 12 and 19 show Berkovich as the shipper for MOGU 2051660 and MOGU 2101987 even though the freight was not paid in full until April 2, 2009 so there would never be any reason to issue such a bill of lading in Berkovich's name for those two containers. According to Lyamport's testimony, he did not have Exhibits 12 or 19 when his deposition was taken in January of 2009. (Lyamport, TR 725-727, Ex 78, KOB 0255 p. 105).

Lyamport contends that the bill of lading for the damaged container listing Berkovich as shipper/consignee was only a draft (Ex 1), and that a final bill of lading was never issued. (Lyamport, TR 718).

Lyamport also testified that a bill of lading is not issued until the time the cargo is to be picked up. (Lyamport, TR 718-721). Although Complainants actually paid the freight for the damaged container on or about August 1, 2008, according to Lyamport, they never sent the final bill of lading. (Lyamport, TR 484).

Lyamport further testified that generally it sent draft of a bill of lading to Int'l TLC apparently after a shipment as sailed, if the freight as been paid. However, Complainants did not

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receive any bill of lading for the damaged container at the time of sailing even though the freight was paid, until three month later on or about November 15, 2008 (Kobel, TR 126-127) (Ex 1).

Third, the actual role of Int'l TLC as freight forwarder was concealed or at best misleading in the various bills of lading issued by Limco. Although Limco knew that Int'l TLC was apparently acting as a freight forwarder, it did not note on any bills of lading which showed Int'l TLC as the shipper that it was acting as an agent for the actual shipper.

46 CFR Section 515.42 provides:

> "(a) Disclosure of principal. The identity of the shipper must always be disclosed in the shipper identification box of the bill of lading. The licensed freight forwarder's name may appear with the name of the shipper, but the forwarder must be identified as the shipper's agent."

The bill of lading for MOGU 2002520, Exhibits 1, 2 and 3 show "Limco as agent for Int'l TLC in the freight forwarding agent box." Again, Lyamport testified this was a "typo" and that Limco was a "default" in its computer system (TR 717). Limco was and is not licensed as a freight forwarder with the Federal Maritime Commission, nor was Int'l TLC at the time any of these bills of lading were issued.

Moreover, the bills of lading for MOGU 2112451 and MOGU 2003255 both have the same notation in their bills of lading (Exhibits 8 and 9), which show in the forwarding agent box: "Limco Logistics, Inc. as agent to International TLC, Inc." Both of those containers were received and were released to the agent Baltic Sea Logistics and shipped to the Ukraine in November, 2008.

The last two containers shipped, MOGU 2051660 and MOGU 2101987 do not disclose Int'l TLC in the forwarding agent box, unlike the first three containers, even though Int'l TLC's role apparently remained the same according to Lyamport. Furthermore, the electronic export

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information filed by Limco for container MOGU 2002520, MOGU 2051660, and MOGU 2101987 do not disclose any freight forwarder, nor Int'l TLC.

Limco and Int'l TLC both misled Complainants concerning the status of the damaged container. Limco and Int'l TLC informed Complainant Kobel that he would be able to inspect the damaged container, but was never allowed to. Secondly, he was informed that this container would be returned to him, and to obtain estimates as to the cost for returning the container to his yard. However, for reasons discussed above, the container was never returned to him (Kobel, TR 80). Third, Limco had informed Kobel that HLAG fixed the container when shipped and everything was fine. (TR 81-82). However, again, the container was never repaired, and in fact, because of the damage, the container was detained in Hamburg, Germany. Kobel asked Int'l TLC and Limco for photographs of the damage in May 2008 but did not receive any until on year later. (Kobel 85-86).

Kobel was given various assurances from both Int'l TLC and Limco that the container was on its way and would be there in time, when in fact there was a protracted dispute between HLAG and Limco regarding delivery of this container at its ultimate destination in Gydnia, Poland. This resulted in Complainants missing various rail appointments that Kobel made to make to ship his containers by rail from Gydnia, Poland to the Ukraine (Kobel TR 91-93, Berkovich, TR 480).

Kobel, and specifically, Victor Berkovich, tried to determine the status and check on the final two containers, MOGU 2051660 and MOGU 2101987 containing motor oil. However, when checking the Port of Gydnia. they learned that there were no containers there in his name. Limco failed to issue any kind of documentation to Berkovich or Kobel for the last two containers and apparently, had listed Int'l TLC as shipper on those two containers (Ex 11, 18;

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Berkovich, TR 484). Berkovich testified that he constantly asked about the two containers containing motor oil at the port at Gydnia, but was told they didn't have any containers in his name. (Berkovich, TR 484). They were unable to obtain release of the containers.

B. Respondent Limco violated Section 10(b)(4)(E) and Section 10(b) 10 by engaging in unfair shipping practices by unreasonably refusing to deal, negotiate or settle Complainants' claim for damaged to container MOGU 2002520.

Complainants allege that Respondent Limco unreasonably refused to deal, negotiate or settle Complainants' claim for damages to container and cargo in MOGU 2002520 (Paragraph 48 of the Complaint).

Complainants provided information, including estimates for a claim regarding damages to MOGU 2002520 to Limco while this container was still at the Port of Portland in May, 2008 (Ex 67, TR). Limco forwarded this information to HLAG/HLAI. (Ex 90, KOB 0284). Although HLAG/HLAI disputed the amount of the claim, (Ex 90, KOB 0284), HLAG apparently had approval from the stevedore at Ports America (TR 557-558) to pay approximately $6,500, including $2,200 for the damaged container itself. (Ex 90, KOB 0283 and TR 557-558). Catherine Ward of HLAI told Nadya Li (Limco) to file a claim with HLAG after the container was shipped from the Port of Portland (TR 578).

On October 31, 2008, Nadya Li again submitted a claim to HLAG consisting of information previously submitted in May, 2008 (Ex 98, KOB 305-311). At that time, HLAG had indicated that the container could not be delivered to the final destination in Gydnia, Poland. (Ex 99, KOB 0312). Lyamport testified that Limco intended to wait until the container delivered and then submit a claim (TR 731).

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However, after container MOGU 2002520 ultimately arrived at its destination in Gdynia, Poland in December, 2008, Limco did not pursue the claim. Mr. Lyamport testified that Limco did not pursue the claim because Complainants had not paid the freight to Limco or Int'l TLC (TR 734, 736). However, evidence cited above shows that Complainants paid Int'l TLC the freight for MOGU 2002520 on or about July 25, 2008 (Ex 110) and Int'l TLC forwarded the payment to Limco, which it received on or about August 1, 2008 (Ex 117).

Limco unreasonably refused to deal with the claim for the damaged container and any loss of cargo, despite HLAG's apparent acceptance of the claim and acceptance of responsibility and willingness to pay at the very least $2,200 for the damaged container. (TR 557-558, Ex 90, KOB 0283). As a result, Complainants never recovered any compensation for the damaged container or cargo in MOGU 2002520.

C. Limco violated Section 10(b)(11) by knowingly and willfully accepting cargo from an ocean transportation intermediary that did not have a tariff, bond or other surety as required by the Shipping Act. Complainants allege that Limco knowing and willfully accepted cargo from an ocean transportation intermediary (Int'l TLC) that did not have a tariff bond or surety. (Paragraph 49 of the Amended Complaint).

Section 10(b)(11) provides:

> " * * *
>
> (b) Common carriers. No common carriers, either alone or in conjunction with any other person, directly or indirectly, may:
>
> * * *
>
> (11) Knowingly and willfully accept transport from or transport cargo for the account of an ocean transportation intermediary that does not have a tariff bond, insurance, or other surety as required by Sections 8, and 9 of this act."
>
> * * *

Int'l TLC was not licensed as an ocean transportation intermediary until it became a licensee as an NVOCC on July 24, 2008. (Ex 75, Barvinenko TR 340). Shipment of all five

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containers occurred prior to Int'l TLC becoming an NVOCC. Int'l TLC has never been licensed as a freight forwarder (Barvinenko, TR 340).

A common carrier does not violate Section 10(b)(11) unless the ocean transportation intermediary operates as an NVOCC EUROUSA Shipping, Inc. Docket No. 06-06 (October 9, 2009) p. 4.

Clearly Int'l TLC acted as a freight forwarder for the shipment of the five containers for the reasons stated below in Section V(A). Lyamport testified that Int'l TLC acted as a freight forwarder for these shipments. (Lyamport, TR 677, 670, 707). However, Int'l TLC's services may have extended beyond a freight forwarder to include services of an NVOCC. An entity can operate as a freight forwarder and as an NVOCC, but must provide separate proofs of financial responsibility. EUROUSA Shipping, Inc. supra p. 6.

A common carrier is a person who holds itself out to the general public to provide transportation by water of passengers or cargo between the United States and a foreign country for compensation, that assumes responsibility for transportation from port of receipt to port of destination and utilizes for all or part of the transportation, a vessel operating on the high seas between the port of the United States to the port of a foreign country. Section 3(b) for the Shipping Act (46 CFR Section 515.2(0)).

Barvinenko testified that Int'l TLC represented its services in advertising as "delivery of cargo to various countries around the world." (TR 343). Barvinenko represented to Complainant Kobel that he would ship the containers to Poland. (TR 70). Barvinenko also attempted to supply containers and hired the distination agent, Baltic Sea Logistics, which are services of an NVOCC. 46 CFR Section 515.2(l).

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Lyamport further admitted that he was not sure whether a Int'l TLC was a licensed ocean transportation intermediary at the time these containers were shipped. (TR 708). Lyamport admitted that Limco never investigated with the Federal Martime Commission whether Int'l TLC was licensed, despite having five or ten prior transaction. Lyamport admitted that this could be checked on the FMC website within minutes. (TR 707, 708).

A carrier willfully and knowingly violates the statue of his own free will or choice when it intentionally disregards the statute or is plainly indifferent to its requirements. Persistent failure to inform oneself of the requirements of the Shipping Act may mean that a person was acting knowingly in violation of the act. EUROUSA Shipping, Inc. Docket 06-06, December 18, 2008, Pages 20-21.

In this case, Limco failed to investigate Int'l TLC's status with the Federal Maritime Commission when it was unsure of whether or not Int'l TLC was licensed. If Int'l TLC was deemed to be not only acting as a freight forwarder but also as an NVOCC, then Limco has knowingly violated Section Section 10(b)(11) of the Act.

V

INTERNATIONAL TLC, INC.

A. Int'l TLC engaged in unlawful shipping activities in violation of Section 19(a) of the Shipping Act.

Int'l TLC engaged in unlawful shipping activities as an ocean freight forwarder without a license with the Federal Maritime Commission prior to July 24, 2008 in violation of Section 19(a) of the Shipping Act.

Complainants allege that Int'l TLC violated Section 19 of the Shipping Act, and Federal Regulation 46 CFR 515.3 and Section 520 by representing itself to Complainants as an NVOCC

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or ocean freight forwarder. (Amended Complaint, Paragraph 45). Section 19(a) of the Shipping Act provides:

> "Ocean Transportation Intermediary.
> (a) Licensing. No person in the United States may act as an ocean transportation intermediary unless that person holds a license issued by the Commission. The Commission shall issue intermediaries licenses to any person the Commission determines to be qualified by experience and character to act as an ocean transportation intermediary."
> * * *

The Shipping Act defines an ocean transportation intermediary as an ocean freight forwarder for a non-vessel operating common carrier. In Section 3(17)(A), an ocean freight forwarder is defined as:

> "(A) An ocean freight forwarder means that a person:
> i. In the United States dispatches shipments from the United States via a common carrier or otherwise arranges space for those shipments on behalf of shippers; and
> ii. Processes the documentation or performs related activities incident to those shipments.
> (B) A non-vessel operating common carrier means:
> A common carrier that does not operate the vessels by which the ocean transportations provided and is a shipper in its relationship to the ocean common carrier."

Freight forwarding service may include, but is not limited to: (1) preparing and/or processing export declarations; (2) booking/arranging for confirmed cargo space; (3) handling freight or other moneys advanced by the shipper for remitting or advancing freight or credit in connection with the dispatch of a shipment, or other money credited in connection with the dispatch of shipment. (46 CFR Section 515.2(i)(3)(11).

The operation and conduct of an ocean transportation intermediary, in particular on a particular shipment, determines whether it operates as an NVOCC or an ocean freight forwarder, not with the label it calls itself. EUROUSA Shipping, Inc. Docket 06-06 p. 4 and p. 22, October 9. 2009.

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Barvinenko denied that Int'l TLC acted as a freight forwarder for the shipment of Complainants five containers. (TR 369-370). Instead, Barvinenko claimed that Limco was the freight forwarder. (TR 349). In previous pleadings, including a summary judgment motion, Int'l TLC has contended that it was really a cargo loader. However, Int'l TLC did not load any cargo for Complainants' five containers.

Barvinenko admits that Int'l LTC was not a licensed NVOCC at the time Complainants' five containers were shipped. (TR 340-351) (Ex 75), nor was it ever licensed as an ocean freight forwarder. (Barvinenko, TR 340). Nevertheless, Int'l TLC represented itself to the public as: "we move cargo internationally." (Barvinenko, TR 342) (Kobel, TR 69). Int'l TLC orally agreed to ship Complainants' five containers from Portland to Poland. (Kobel, TR 70) (Barvinenko, TR 346-347).

Int'l TLC performed the following services for Complainants with respect to the shipment of these five containers: 1) booked space with Limco for cargo (TR 354), 2) collected freight moneys from Complainants and paid Limco (TR 354); kept money left over as its profit ($200-$300 per container) (TR 354); 3) selected the destination agent in Poland (Baltic Sea Logistics) (TR 355); 4) admitted that it probably prepared packing lists for containers (TR 357); 5) found containers for Complainants, but Complainants ultimately used different containers (TR 350, 351); 6) investigated shipping containers by rail from Poland to the Ukraine (TR 362); and 7) The bills of lading for MOGU 2002520, MOGU 2112451, and MOGU 2003255 show Int'l TLC in the freight forwarding box. (Ex 1, Ex 8, Ex 9).

The preponderance of the evidence clearly shows that Int'l TLC actually performed many freight forwarding services in the shipment of these five containers. It went even further, representing to the public and Complainants (TR 69-70) that it was a cargo moving company and

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could transport containers internationally from the United States to Poland. Thus, this could also be considered as acting as an NVOCC. (TR 70, 343).

B. Int'l TLC violated Section 10(d)(1) by unreasonably observing regulations practices with respect to receiving, handling, and delivering property.

The Amended Complaint alleges violations of Section 10(d)(1) with respect to Int'l TLC, Paragraphs 43(a)(i)(j).

1. Int'l TLC did not have authority from the Complainants to change the shipper/consignee for the bills of lading for the three liquidated containers to Remishevskiy.

Int'l TLC instructed Limco to change the bills of lading for Complainants' three containers to Remishevskiy on March 2, 2008 (Ex 85, Barvinenko TR 392). Complainants did not give Int'l TLC authority to change these bills of lading from Berkovich's name to Remishevskiy. (Kobel, TR 116, Berkovich, TR 483). Barvinenko admits that Limco did not have authority from Complainants to change the shipper/consignee in these bills of lading. (Barvinenko TR 393, 394).

Int'l TLC breached its fiduciary duty as a freight forwarder and agent of Complainants, and violated Section 10(d)(1) by changing the bill of lading to Remishevskiy without authorization. This violation resulted in the wrongful delivery of the three liquidated containers.

2. Int'l TLC did not have lawful authority to sell the three containers.

Int'l TLC exercised essentially a 'self help" remedy to pay itself and collect money for others when it conducted the liquidation sale of Complainants' containers.

Int'l TLC had no contractual right to sell Complainants' containers. Complainants and Int'l TLC had only an oral agreement to ship five containers for a specific price. (TR 69-90) (TR 347-348). Int'l TLC did not issue any bills of lading as carrier for these five containers. It never had

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possession of the cargo and therefore did not have any possessing lien. Moreover, Int'l TLC did not have any common law or statutory carrier's lien against the cargo for unpaid freight.. Int'l TLC was not and has never been a licensed freight forwarder under the Federal Maritime Commission. It did not become a licensed NVOCC until after shipment of Complainants' five containers. Because it was not licensed and operated in violation of Section 19 of the Shipping Act, any maritime lien would be unenforceable.

3. Int'l TLC violated Section 10(d)(1) by misleading Complainants and failing to provide accurate information regarding Complainants' containers

46 CFR Section 515.32 sets forth certain duties of a freight forwarder. This regulation provides in pertinent part as follows:

* * *

> "(c) Information provided to the principal. No licensed freight forwarder shall withhold any information concerning a forwarding transaction from its principal, and each licensed freight forwarder shall comply with the laws of the United States and shall exercise due diligence to assure that all information provided to its principal or provided in any export declaration, bill of lading, affidavit, or other document which the licensed freight forwarder executes in connection with the shipment is accurate."

Int'l TLC violated its freight forwarder duties under Section 515.32(c) in several respects.

First, it instructed Limco to enter Int'l TLC as a shipper in the shipping box of the bills of lading without Complainants' authorization. (Kobel, TR 125, Berkovich, TR 43). Second, Int'l TLC failed to comply with Section 515.42(a) regarding disclosure of the principal in the shipper's identification box (see Section IV(D) above).

Second, Int'l TLC provided Complainants with misleading and inaccurate information about the status of the damage container. (See Section IV(D) above).

Third, Int'l TLC failed to provide any documents or written confirmation regarding the terms of the shipment for Complainants' five containers. (Barvinenko, TR 347-348).

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Fourth, Int'l TLC failed to provide any documents whatsoever to Complainants for containers MOGU 2101987 and MOGU 2051660 (Barvinenko, TR 374-376).

Fifth, Int'l TLC refused to provide any information to Complainants after January 9th regarding the three containers. (Kobel, TR 106-107).

Sixth, Int'l TLC gave Complainants inaccurate and misleading information about the status of the three containers after the liquidation sale telling Complainants that Baltic Sea Logistics took possession of the containers. (Kobel, TR 110-112).

In short, despite shipping cargo with a value in excess of $100,000 in containers MOGU 2051660 and MOGU 2101987, Int'L TLC failed to provide any documents of ownership or shipping contract for these two containers to Complainants. As a result. these containers were not in the computer system under Complainants' name in Poland.

4. TLC liquidation sale was not conducted in a commercially reasonable manner.

Even assuming that Int'l TLC had a legal right to sell the containers, which Complainants deny, Int'l TLC's liquidation sale was not conducted in a commercially reasonable manner.

A sale of personal property pursuant to a security intent agreement or lien statute must comply with UCC 9-609, to 9-613 UCC 7-308 (1), RCW 62(A) 7-308(1). This sale failed to comply with the UCC or Washington Statutory in numerous respects.

First, the notice of unpaid balance was sent to Complainants on or about January 9, 2011 (Ex 79, Ex 80) charged excessive fees and costs that were not incurred or owed by Int'l TLC, in the amount of $43,727. This Exhibit 80 charges for standby and overweight cargo for two containers which had already been released in November, 2008 by Int'l TLC. There were also charges from Affordable Storage which were never paid by Int'l TLC in the amount of $14,987. (TR 380-381).

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Second, the notice does not give the notice of sale or whether it will be public or private, or the date and time. The notice omits completely any reference to the damaged container. (Ex 79).

Third, Int'l TLC did not advertise the sale in any reasonable manner. There was no advertisement, in a paper or journal. There was simply a sign posted in its office. (Ex 76, 22-23) (TR 383). Only customers of Int'l TLC had any notice of the sale.

Fourth, there was no evidence that these containers were sold in any recognized market, or sold in conformity for prices current in such market or sold in conformity with commercially reasonable practices among dealers for those types of goods sold. There was never a marine survey of the cargo before sale. (TR 383). There was no evidence that a cargo liquidator was used or consulted.

Fifth, Oleg Remishevksiy testified that there was no price list on the sign in Barvinenko's office, and there was never any negotiation. (TR 306-308). Barvinenko asked only for the amount of his expenses ($9,900) despite the cargo with documented values from invoices and packing lists of over $114,000. Remishevksiy testified in his deposition that Barvinenko told him he had to move these containers really quickly because he had a problem (Ex. 76, KOB 187).

Sixth, the actual storage charge for containers MOGU 2051660 and MOGU 2101987, was a total of $5,600, and the charges for freight were $9,900 (Ex. 80). The remaining charges on Ex 79 and Ex 80 and on the notice sent to Complainants were not related to expenses associated with the liquidation of these three containers for a total sum of approximately $27,000. (Ex 80).

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Finally, the sale of more goods than necessary to be offered to ensure satisfaction of the obligation is not commercially reasonable. UCC 7-308, and RCW 62A 7-308(1) states:

> "The sale of more goods than apparently necessary be offered to ensure satisfaction of the obligation is not commercially reasonable."

Here, the containers and the cargo had a combined total of nearly $120,000. Valeriy Struchkov, a Valvoline dealer in the Ukraine, testified that there was a high demand for good motor oil from the United States. (TR 442, 444-445). A sale for $15,000 for freight and storage charges clearly does not warrant selling all three containers and cargo when container MOGU 2101987, MOGU 2051660 and MOGU 2002520 each have enough value to cover any such expenses.

Finally, the suspicious circumstances of this sale to Oleg Remishevskiy, who was acting as a "middle man" is highly suspect. Remishevskiy testified that he paid for these containers with $9,900 of his own funds. In his deposition, he testified that he was paid by people from the Ukraine $9,900, which he then paid to Barvinenko (Ex 76, KOB 188, p. 27, 29). Further, at his deposition, Remishevskiy did not make any mention of receiving the damaged container and selling the cargo (plywood) for approximately $10,000 plus $2,000 for the two motorcycles. (TR 323, 335, 344). (Ex 76, KOB 193, p. 49).

In addition, Barvinenko sold these three containers on February 23, 2009. (Ex 82), which was only ten days after Berkovich had inquired to Baltic Sea Logistics about the storage fees of these containers in Gydnia, Poland. (Ex 104, Ex 105). Int'l TLC refused to speak to Complainants after January 9, 2009 (Kobel, TR 106-107). Int'l TLC received an installment payment of $1,500 on January 9, 2009 and two additional installments, for a full payment for the freight by April 2, 2009. Int'l TLC accepted the payment and did not refund it until May 13, 2008. (Ex 89), after confronted by Kobel. (Kobel, TR 117-118).

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VI

DAMAGES

The Shipping Act Section 11 allows reparations to Complainants to actual injury caused by the violation. Reparations under the act and damages are synonymous. Federal Maritime Commission v. South Carolina State Courts, 535 US 743, 775, (2002) (Breyer dissenting) DSW International v. Commonwealth, Inc. supra p. 22. Damages must be the proximate result of the violation in question. James J. Flannigan Shipping Co. v. Lake Charles Harbor and Terminal District, 30 S.R.R. 8, 13, 2003.

Generally, damages for cargo claims have been the market value of the cargo at the port of destination. DSW International v. Commonwealth, supra p. 22. The test of market value may be discarded and a more accurate means resorted to if for special reasons, it is not exact or otherwise appropriate. DSW International v. Commonwealth, Inc. supra p. 22. Illinois Cent. R. Co. v Crail 281 US 57, 64-65, (1930).

In the case of DSW International v. Commonwealth Inc., supra p. 24, Complainant was entitled to reparations but could not prove the market values for cars in Lagos, Nigeria. The Commission found that the cars had some value and therefore the market value was discarded. The Court in the DSW International v. Commonweath, Inc. case allowed reparations for Complainants in the amount of the proven investment in improving the cars and shipping them. DSW International v. Commonwealth Inc., supra p. 24.

In this case, Complainants were unable to prove the market value of the cargo at the destination in the Ukraine for the three liquidated containers. Similar to the case of DSW International v. Commonwealth Inc. the Court should therefore discard the market value in

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determining Complainants' reparations in the amount of their investment in the cargo and containers and their shipping expense for these three containers.

A summary of the amount invested for cargo in each of the five containers are summarized in Exhibits 132 (MOGU 2002520), Exhibit 133 (MOGU 2051660), and Exhibit 134 (MOGU 2101987). The documents supporting these values are cited in each of the above respective exhibits consisting of cancelled checks, invoices, receipts, as well as the packing list for the cargo in each of the containers. Generally, the amount stated in each of the exhibits is the value stated in the packing list for each container. Complainants seek the amount stated under the column of "amount paid in the USA" for each container.

In short, the total sum of the cargo for the three liquidated containers is $114,235, which is the amount Complainants invested in the cargo.

The shipping charges are summarized in Exhibit 136 in the total sum of $19,721, consisting of $7,146 for purchase and transportation of the three containers, $4,600 freight for damaged container MOGU 2002520, and storage charges of $4,875 for MOGU 2112541 and MOGU 200255. Complainants paid $3,100 for storage charges for 2051660.

The total amount for cargo and shipping expenses for the containers is the sum of $133,956.

VII

DUPLICATIVE CLAIMS

Respondent HLAG/HLAI raised the issue of duplicative claims. At the conclusion of the hearing, the Court indicated that the parties should brief this issue. (TR 756-759). Complainants maintain that they are the owners of the cargo and the containers. The parties previously entered

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into a stipulated fact that Complainants were the owners of the cargo and containers (Stipulated Fact #1).

The documentary evidence showed that Kobel and Berkovich paid for the cargo and the three liquidated containers. The plywood was purchased from Home Depot by Kobel and Berkovich and paid for on Kobel's credit account with Home Depot. (Ex 58, 59, 60, 61, 62). The ATVs were purchased by Kobel, dba Mission Trucking. (Ex 56). The motor oil was purchased at Walmart, paid by cashier's check from US Bank by Kobel. (Ex 51, KOB 0101-0103). Kobel also purchased motor oil at Estacada oil, which was invoiced to Kobel, dba Mission Trucking. (Ex 52, KOB 0104-0105).

Kobel testified that he purchased the plywood at Home Depot and the motor oil at Walmart. (Kobel, TR 74-75). Berkovich was with Kobel when they purchased the plywood at Home Depot. (TR 469). Kobel mostly paid for plywood, but Berkovich also helped by giving money to Kobel. (TR 469, 519). Berkovich also was with Kobel when he purchased the motor oil. (TR 469, 470).

Berkovich admitted that the family members helped with the purchase of the cargo. (Berkovich, TR 493). Berkovich also testified that he and Kobel borrowed money from relatives and his brother. (TR 529). Kobel testified that he borrowed money from his wife, sister, brother, and brother-in-law (Konstantine) (Kobel, TR 263-246), his sister and her trucking company Emmanual Logistics helped him make some shipping freight payments. (TR 231). In short, Complainants purchased the cargo and containers and are the owners. No other party has any ownership interest in the cargo or the container.

Nevertheless, to address HLAG/HLAI hypothetical issue of possible duplicative claims, Complainants would propose submitting an assignment and hold harmless agreement to

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Complainants from any of these family members mentioned at the hearing thereby assigning their interest to Complainants and waiving any claim against Respondents. In the event that an interested party is not willing to execute an assignment and hold harmless the Respondents, Complainants and the interested party could submit affidavits and documentation to the Court to determine any claim and amount they have to the subject cargo or container.

VIII

CONCLUSION

Based upon the foregoing reasons, Complainants request that an Order be granted in their favor, and consistent with their proposed conclusions of law attached to this brief.

Respectfully Submitted this 28 day of September, 2011.

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CERTIFICATE OF SERVICE

The undersigned declares under penalty of perjury that the following is true and correct:

1. I am over the age of eighteen years and I am not a party to this action.

2. On September 28, 2011, I served a complete copy of: a party to this action:

COMPLAINANTS' POST-HEARING BRIEF AND CLOSING STATEMENT; and

COMPLAINANTS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

to the following parties at the following addresses, postage prepaid by first class mail and email:

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DATED: September 28, 2011.

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